Supreme Court, U. S.
FILED
JAN 17 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
UNITED STATES OF AMERICA OCTOBER TERM 1977
No. 77-1015

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

-vs-

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents.

-vs-

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

# PETITION FOR WRIT OF CERTIORARI

ANGELO T. CALLERI, ESQ.
ANTELL, HARRIS & CALLERI
ATTORNEYS AND COUNSELORS AT LAW
600 MARINE MIDLAND BUILDING
19 WEST MAIN STREET
ROCHESTER, NEW YORK 14614

TABLE OF CONTENTS


Opinions Below . . . . . 2

Jurisdiction . . . . . 3

Questions Presented. . . . . 4

Constitutional Provisions, Statutes and Regulations . . . . . 6

Statement of Facts . . . . . 7

Reason for Granting the Writ . . . . . .13

Conclusion . . . . . .33


The Petitioners, Ronald Prate, et al., respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 20, 1977.

## OPINIONS BELOW

On October 20, 1977 the United States District Court of Appeals for the Second Circuit entered an order without opinion affirming the decision of the United States District Court for the Western District of New York. (Appendix D, pp. 1, 2).

The opinion of the United States District Court for the Western District of New York (Appendix C, pp. 1-11) entered the 3rd day of May, 1977 has not been reported.



## JURISDICTION

1. The Judgment of the United States Court of Appeals for the Second Circuit, affirming the decision of the United States District Court for the Western District of New York, was entered on the 20th day of October, 1977. (Appendix D, pp. 1, 2).

2. The jurisdiction of the Court is invoked under Title 28 of the United States Code, §1254(1), providing for the granting of a Writ of Certiorari upon the petition of any party after rendition of judgment by the Court of Appeals for the Second Circuit.

## QUESTIONS PRESENTED

1. Has the Court of Appeals erred in holding that the instant action is an impermissable collateral attack on the Consent Decree?
2. Has the Court of Appeals for the Second Circuit erred in affirming the decision of the United States District Court for the Western District of New York where there has been no admission or judicial finding of past discrimination and a Consent Decree has nevertheless been entered which prefers less qualified minority applicants for an entry level position in the City of Rochester Police Department over non-minority applicants?
3. Has the Court of Appeals for the Second Circuit erred in affirming



the decision of the United States District Court for the Western District of New York in view of the decision of the Supreme Court of the United States in Washington v. Davis, 427 U.S. 229, 48 L. Ed. 2d 597, 96 S.Ct. 2040 (1976)?

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The provisions of Constitutions, Statutes and Regulations which are relevant to the decision of this case, and the pertinent text of which is set forth in Appendix A hereto, are as follows:

1. Article IV, Section 1 of the United States Constitution.
2. 28 U.S.C. Section 1343(3).
3. 42 U.S.C. Section 1981.
4. 42 U.S.C. Section 193.
5. 42 U.S.C. Section 2000(d).
6. 42 U.S.C. Section 2000(e) et seq.
7. 42 U.S.C. Section 2000(d)-2.
8. 28 C.F.R. Section 42. 201 (a)-(b).
9. 28 C.F.R. Section 42. 203.
10. Article 1, Section 11 of the New York State Constitution.
11. Article 5, Section 6 of the New York State Constitution.



## STATEMENT OF THE FACTS

The action from which appeal was taken to the U.S. Court of Appeals for the Second Circuit was commenced by the sixteen named Petitioners on September 17, 1976. Petitioners sought relief from past discriminatory employment practices which have preferred black, Spanish surnamed and other non-white persons over white persons in the recruiting, testing and hiring of applicants for the position of police officer in the City of Rochester, New York. Past discrimination and the perpetuation thereof has resulted from the implemention of a Consent Order and Judgment signed by the Honorable Harold P. Burke on May 12, 1975 which provided in pertinent part for a 25% minority hiring quota to be effectuated by the creation of two separate eligibility lists, one for minority and the other for non-minority candidates. Until the 25% quota is reached, appointments to the entry level position of police officer are to be made by selecting two persons from the list of minority candidates for every

three persons selected from the list of non-minority candidates.

Fourteen of the sixteen discriminatees herein took and passed the November 9, 1974 qualifying examination but have thus far been denied appointment. The two remaining discriminatees, Carol Tschiderer and Thomas A. Tschiderer, took and passed the July 10, 1976 qualifying examination and have similarly been denied appointment.

Respondents have arbitrarily and wrongfully determined that in order for a white person to be potentially eligible for appointment as a police officer, his score on the written examination must be 90 or over while a non-white persons's score must be 75 or over. Non-white persons having a particular score are preferred over white persons having the same or higher scores.

The above mentioned Consent Order resulted from the action entitled "John E. Howard, et al v. Elisha Freedman, et al 74 Civ 234



(W.D.N.Y.)" wherein Plaintiffs sought relief against the allegedly discriminatory hiring practices of the Rochester Police Department. Prior to the entry of the Consent Order, there was no hearing on the question of past discrimination nor on the job relatedness of the qualifying examination given and administered by Respondents on November 9, 1974. In fact, these findings have never been a part of the record.

A "hearing" into the fairness and propriety of the stipulation of settlement was held before the Honorable Harold P. Burke on the day that trial was to commence, however, the sole finding made thereat was that adequate notice had been given to members of the minority class. Indeed, publicity was predominately directed towards the minority class as evidenced by the words of the Consent Order itself:

> "The parties hereto have entered into a Stipulation for Settlement of the issues raised in this action; and the Court having

> ordered that notice of hearing on the advisability of the settlement be given to the members of the class; and the Court, after said notice and hearing having approved the terms of the said Stipulation for Settlement,"

None of the Petitioners received notice of the "hearing" before the Honorable Harold P. Burke, although fourteen of them had previously taken the November 9, 1974 entrance examination and were known by Respondents to be members of a class of discriminatees against whom the Consent Order would operate. None of the Petitioners was present at the hearing.

Thereafter fourteen of the sixteen named Petitioners sought to intervene in the Howard action pursuant to Rule 24(a) (2) FRCP. Their application for intervention was denied, however, on the basis of untimeliness and adequacy of notice.

The present action was brought pursuant to Article XIV, §1 of the United States Constitution, the Civil Rights Acts of 1870 and 1871, Title VI of the Civil Rights Act of 1964, Title



VII of the Civil Rights of 1964, as amended, 42 U.S.C. §2000(e) et seq.and Article V, §6 of the New York State Constitution to redress the evils of the two list hiring scheme. Respondents-Intervenors moved to intervene on or about September 27, 1976, which motion was granted by the Court. Petitioners moved for a preliminary injunction to restrain appointments to the Police Academy on or about October 14, 1976 and such motion was denied by order of the Court dated October 20, 1976. The Respondents-Intervenors and the Respondent, County of Monroe, moved by Notice of Motion dated October 8, 1976 to dismiss Petitioner's cause of action pursuant to Rule 12b FRCP on the ground the Court lacked jurisdiction. The Court, by the Honorable John T. Curtin, rendered its decision on May 3, 1977, granting the motion to dismiss on the grounds of improper collateral attack upon a final judgment.

The Consent Order and Judgment, by its very terms however, is not final. Paragraph

12 of the Consent Order and Judgment states:

> "The United States District Court for the Western District of New York shall continue to have jurisdiction of this matter to entertain an application by any party hereto, made upon papers served upon the other parties hereto at least ten days prior to the return date thereof, seeking relief in the form of interpretation, application, adjustment or termination of any of the terms of the Stipulation on the grounds of inequity or impractability."

Petitioners appealed from this dismissal to the United States Court of Appeals for the Second Circuit which affirmed without opinion.

Based upon the non-finality of the Consent Order and Judgment, the inapplicability of the doctrine of collateral estoppel and for other reasons more particularly set forth below, Petitioners respectfully pray that this Honorable Tribunal will grant a Writ of Certiorari.



## REASONS FOR GRANTING THE WRIT

### I

**THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THIS COURT NEEDS TO SETTLE THE QUESTION WHETHER PERSONS NOT PARTIES TO A PRIOR ACTION NOR IN PRIVITY WITH ANY PARTY, AND WHO HAVE EXPRESSLY BEEN DENIED THE RIGHT TO INTERVENE, MAY BE HELD BOUND BY A NON-FINAL CONSENT ORDER RESULTING FROM A STIPULATION OF SETTLEMENT OF THE PRIOR ACTION.**

**There is a fundamental difference between the doctrine of res judicata and collateral estoppel. Under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.** Lawlor v. National Screen Service Corp., **349 US 322, 326, 75 S. Ct. 865, 867, 99 L. Ed. 1122 (1955). Since Petitioners have commenced but one action against Respondents,**

the doctrine of res judicata is inapplicable.

There are at least four elements which must be satisfied before an order in a former action can be given collateral estoppel effect at a later proceeding: (1) [T]he issue sought to be precluded must be the same as that involved in the prior action; (2) That issue must have been actually litigated; (3) It must have been determined by a valid and final judgment; and (4) The determination must have been essential to the prior judgment. Haize v. Hanover Ins. Co., 536 F2d 576, 579 (3d Cir. 1976); See ¶1B J. Moore, Federal Practice 0.443[1] (2d ed. 1974); restatement (2d) of judgments, Tent Draft #1, §68 (March, 28, 1973). At least three of these four minimum requirements have not been met.

The cases contain factually distinguishable issues. Plaintiffs in the Howard action alleged that an unvalidated written qualifying examination had a disproportionate and, therefore, discriminatory impact upon non-white minority



candidates. Plaintiffs in Prate attack a discriminatory two list hiring system which intentionally prefers lesser qualified minority candidates solely on the basis of race. The claim is one of discrimination in reverse against white candidates.

In Mc Aleer v. American Telephone & Telegraph Co., 416 F. Supp., 435 (1976), Plaintiff, Mc Aleer, commenced his action pursuant to Title VI of the Civil Rights Act of 1964 claiming that a less qualified, less senior female was preferred over him for appointment. A T & T defended on the basis of a consent judgment containing an affirmative action program which obligated it to favor women regardless of seniority in order to eliminate past sex discrimination. The Court, treating the question of identity of issues, stated at pages 438, 439:

> "Plaintiff, Mc Aleer, thus stands as an innocent employee who had earned promotion but was disadvantaged when A T & T rejected his application in order to rectify its past discrimination against women.

> While factually related to the Philadelphia proceeding, this claim does not in any way impugn or collaterally attack the judgment in that case. Rather, it asserts a cause of action for sex discrimination within the Civil Rights Act of 1964 and this Court clearly has jurisdiction to decide the issue. It is unnecessary to elaborate on the obvious fact that a Consent Decree expressly did not and could not have conclusively determined the rights of nonparties such as Plaintiff Mc Aleer."

By parity of reasoning, jurisdiction existed to determine Petitioner's claim of racial discrimination.

The fundamental requirement of actual litigation is simply not present in this case. There has never been a hearing on the merits; Petitioners have never been permitted to join as parties to the Howard action. Absent actual litigation, there can be no collateral estoppel.

Nor is the Consent Order a valid and final one. Paragraph 12 of the Consent Order expressly provides for continuing jurisdiction by the District Court to amend or even terminate the



said order. When an order is subject to redetermination, as such, it is nonfinal. Gerstle v. Continental Airlines, Inc., 466 F2d 1374, 1377 (10th Cir. 1972); In re Cessna Aircraft Distributorship Antitrust Litigation, 518 F. 2d 213, 215 (8th Cir.), Cert. denied, 423 U.S. 947, 96 S.Ct. 363, 46 L. Ed. 2d 282 (1975).

Absent a finding of a clear cut pattern of long-continued and egregious racial discrimination, the imposition of mandatory quotas is constitutionally forbidden reverse discrimination. Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975). A long term, mandatory hiring quota, based upon no showing whatsoever of past discrimination nor its perpetuation, is here involved. The order is constitutionally invalid and affords no basis for the application of the doctrine of collateral estoppel.

Fundamentally, the party against whom the estoppel is asserted must have been a party, or in privity with a party to the prior adjudication. Scooper Dooper, Inc. v. Kraftco Corp., 494 F2d

840, 844 (3rd Cir. 1974). Petitioners were not parties to the earlier Howard action. Fourteen of the sixteen Petitioners sought to intervene but were expressly denied that right. Two of the named Petitioners, Carol Tschiderer and Thomas Tschiderer, were not at all involved in prior proceedings; they did not seek to intervene and, in fact, did not take the written qualifying examination until July 10, 1976.

It is respectfully submitted that the District Court has misapplied the doctrine of collateral estoppel to Petitioners prejudice and has departed far from the accepted and usual course of judicial proceedings. In affirming the decision below, the U. S. Court of Appeals for the Second Circuit has so far sanctioned such a departure as to call for an exercise of this Court's power of supervision.



II

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH ITS DECISIONS IN UNITED STATES V. WOOD, WIRE AND METALS LATHERS INTERNATIONAL UNION, LOCAL UNION NO. 46, 471F.2d 408, PATTERSON V. THE NEWSPAPER AND MAIL DELIVERS' UNION OF NEW YORK AND VICINITY, 514F2d 767 (1975), VULCAN SOCIETY OF N. Y. CITY FIRE DEPART., INC. V. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, 490F2d 387 (1973), BRIDGEPORT GUARDIANS, INC. V. MEMBERS OF THE BRIDGEPORT CIVIL SERVICE COMMISSION, 482F2d 1333 (1973), KIRKLAND V. THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, 520F2d 420 (2d Cir. 1975) AND IS EQUALLY IN CONFLICT WITH UNITED STATES V. CITY OF CHICAGO, 549F2d 415 (7th Cir. 1977) AND MYERS V. GILMAN PAPER CORP., 544F2d 837 (5th Cir. 1977).

42 U.S.C. §2000(e) - 2(J) provides:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organiza-

> tion, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, in comparison with persons of such race, color, religion, sex or national origin in any community, state, section, or other area, or in the available work force in any community, state, section or other area."

The only limitation on the powers of affirmative relief granted by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) et seq. is that restricting preferrential quota hiring. In order for a quota to be distinguishable from a preference, there must be a specific finding of past discrimination. Quotas merely to attain racial balance are expressly forbidden, however, quotas to correct past discriminatory practices are not. United States v. Wood, Wire & Metal Lathers International Union, Local Union No. 46, 471F2d 408.

In Wood, supra., the provisions of a Consent Decree requiring a local union to take



certain affirmative action to remedy the effects of past discriminatory practices were upheld on appeal. The United States Court of Appeals for the Second Circuit found that the record was replete with evidence of past discrimination including an admission and acknowledgment by appellants themselves in the settlement agreement which became the basis of the Consent Decree.

In Patterson v. Newspapers and Mail Delivers' Union of New York and Vicinity, 514 F2d 767, 771, another case involving a Consent Decree the Court, citing Wood, supra., upheld the challenged Consent Decree stating:

> "Nor should we substitute our ideas of fairness for those of the District Judge in the absence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest, (citations omitted), especially in a case like the present one where the settlement was approved after a four week trial on the merits, and two hearings with respect to the fairness and adequacy of the proposed agreement."

A prima facie case of discrimination is established under Title VII where the evidence shows "that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed. 2d 280 (1975). Upon such a showing, the burden shifts to the employer to show "that any given requirement [has] a manifest relationship to the employment in question," and that the "disparity [is] the product of non-discriminatory factors." Griggs v. Duke Power Co., 401, U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).

It is respectfully submitted that before a permanent 25% hiring quota is approved, there must be a fact finding hearing on the issues of past discrimination and job-relatedness of the qualifying examination. Otherwise, an unlawful hiring preference exists.

The two list hiring system at issue has precisely the same characteristics and conse-



quences as the system disallowed in Kirkland v. New York State Department of Correctional Services, 520 F2d 420 (2nd Cir. 1975). The benefits of such order are not limited to the plaintiffs class. Its quota requirements are based upon a shifting and rapidly expanding racial base, wholly unrelated to the consequences of any alleged past discrimination. It provides for appointment according to race without regard to the individual applicant's standing on a job-related examination. It completely ignores the statutory requirements and constitutional purpose of the New York Civil Service Law and constitutes Court-imposed reverse discrimination without any exceptional or compelling governmental purpose.

Article 5, Section 6, of the New York Constitution requires that appointments and promotions in the civil service "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive."

The system here imposed negates the competitive purpose of the written examination and, in the absence of a showing of past discrimination, is constitutionally suspect.

There is no precedent within the Second Circuit for the broad, sweeping remedial relief imposed by the District Court. In reviewing its "limited" and "gingerly" use of quotas, the Court, in Kirkland, observed that in each case, "there was a clear cut pattern of long-continued and egregious racial discrimination. No such pattern of practice has been shown by Respondents."

In an equity case, the nature of the violation determines the scope of the remedy. Swann v. Charlotte-Mecklenburg Board of Education, 402, U.S. 1, 16, 91 S. Ct. 1267, 28 L. Ed. 2d 545. There is, therefore, no basis for justifying a remedy where there has been no violation and no basis for justifying a remedy substantially broader than that called for by the violation.



When a District Court finds that discriminatory practices on the part of a union or an employer have prejudiced minority workers, it should frame its relief with an eye towards remedying the wrong, see generally Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 95 S.Ct. 2362, 45 L. Ed.2d 280 (1975), and should interfere with the Defendant's operations no more than is necessary to accomplish this result. E. E. O. C. v. Local 638 . . . Local 28, Sheet Metal Workers, 532 F2d 821, 829 (2d Cir. 1976); Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975). A Court should not proceed to issue a broad sweeping remedial order without some evidence before it as to the effect which the order will have. E. E. O. C. v. Local 14, International Union of Operating Engineers, 533 F2d 251 (2d Cir. 1977).

In some cases it may be unnecessary to provide a full evidentiary hearing on relief to a party that has fully participated in prior

stages of the proceeding. See United States v. Wood, Wire and Metal-Lathers Local No. 46, 471 F2d 408, 415-16 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2773, 37 L. Ed. 2d 398 (1973). However, where, as in the instant case, the Petitioners have been barred from participation at all levels, a hearing on the relief to be ordered is required.

The decision appealed from creates a conflict of opinion within the Circuit Courts of Appeal which should be settled by this Court. In United States v. City of Chicago,, 549 F2d 415, 437 (7th Cir. 1977) the Court stated that "preferrential numerical relief nevertheless remains an extraordinary remedy, and its use must be justified by the particular circumstances of each case." The imposition of a racial quota in United States v. City of Chicago, supra., occured only after specific findings of discrimination were made after a seventeen day hearing on requested preliminary relief and a trial on the merits.



The rule has been equally well settled in the Fifth Circuit. Before a Court can grant any relief in a Title VII suit, it must find that the Defendants engaged in the unlawful employment practice alleged in the complaint. 42 U.S.C. §2000(e)-5(g); Myers v. Gilman Paper Corp., 544 F2d 837 (5th Cir. 1977). In Myers, the Court approved a Consent Decree containing provisions for affirmative relief only after fifteen months of motions and discovery and a four day trial on the merits.

The issue thus narrows itself to the legality of preferences and quotas in an affirmative action plan where there has been no admission or judicial finding of past discrimination. This is an important Federal question which has not been, but should be settled by this Court.

III

THIS CASE MERITS REVIEW BY THIS COURT ON CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISION IN WASHINGTON V. DAVIS, 427 U.S. 229, 48 L. Ed. 2d 597 96 S. Ct. 2040 (1976).

The case of Washington v. Davis, 427 U.S. 229, 48 L. Ed. 2d 597 96 S. Ct. 2040 (1976), changes existing case law in the area of racial discrimination in two significant respects. The standard by which racial discrimination cases under the Constitution are to be judged is now one of intentional or invidious discrimination. Previously, as in Bridgeport Guardians v. Members of the Bridgeport Civil Service Commission, supra., Vulcan Society of the New York City Fire Depart. v. Civil Service Commission of the City of New York, supra., and Chance v. Board of Examiners, 534 F2d 1933 (2nd Cir. 1975), upon a showing of disproportionate racial impact, the municipality or employer was put to the burden of proving that the qualifying examination was validated in terms of job performance.



In Washington v. Davis, supra., the hiring practices of the Police Department of the District of Columbia were challenged as discriminatory on the grounds that the personnel tests allegedly excluded a disproportionately high percentage of black applicants. The Court stated:

> "We have difficulty understanding how a law establishing a racially neutral classification for employment is nevertheless discriminatory and denies 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. (426 U.S. 245)

The result of Washington is that plaintiffs alleging racial discrimination under the Constitution must now prove that the municipality or employer invidiously discriminated against them.

At the time the Court entered the May 12, 1975 Consent Decree, the "test" of discrimination was identical in both Constitutional and Title VII cases. Significantly, therefore, no showing of invidious discrimination has ever been made.

Moreover, recent decisions by the United States Supreme Court seem to point in the direction of a uniform standard, such as the compelling interest test, for all cases of alleged discrimination. In Mc Donald v. Santa Fe Trail Transporation Co., No. 75-260, slip. op. (June 25, 1976), the Court held that Title VII and Section 1981 of Title 42 of the United States Code prohibit discrimination against all races on the same terms.

Classification by race is subject to strict scrutiny at least where the classification results in a detriment to a person because of his race. In the case of such a racial classification, not only must the purpose of the classification serve a "compelling state interest", but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the States' goals by means which impose a lesser limitation on the rights of the group disadvantaged by the racial classification. Bakke v. Regents of the University of California, Sup.,



32 Cal. Rptr. 680, 690. In this case, there has never been a showing that the affirmative hiring plan is the least intrusive or even the most effective means to ameliorate allegedly past discriminatory hiring practices.

In Bakke, the Court struck down a special admissions program which afforded a preference on the basis of race to persons who were not as qualified for the study of medicine as non-minority applicants denied admission. The facts in Bakke parallel the facts in this case. Since no showing has been made of past discrimination, what exists is a racial preference, for which no compelling governmental interest has been shown.

Ironically, the very system designed to cure allegedly past discrimination invidiously discriminates in reverse against non-minorities. "No form of discrimination should be opposed more vigorously than the quota system." Mc-Williams, A Mask for Privilege (1948 p. 238.); also see Associated General Contractors of

California v. Department of Commerce, ___F2d____ (1977), where a determination was made that minority quota systems are "invidious and unconstitutional".

Notwithstanding this Court's decision in Washington v. Davis, supra., and the complete lack of proof of past discrimination, the Honorable John T. Curtin effectively continued the application of the invidious two list hiring system by denying petitioners an opportunity to be heard.

Part III of the Court's decision in Washington v. Davis held that a written entrance examination was validated when a positive relationship between the test and training course performance was shown. In their Title VII cause of action, plaintiffs in Howard alleged that the written qualifying examination given and administered by the Rochester Police Department was insufficiently related to job performance.

Thus, in both Constitutional and Title VII respects, the factual allegations contained



in the Howard complaint are invalid measurements of racial discrimination according to present standards. The Consent Decree which grew out of the Howard action, therefore, rests on an insecure foundation.

In the interest of uniformity of judgments and a clear settlement of the law in this context, this Court should exercise its power of supervision.

## CONCLUSION

For the reasons above stated, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANGELO T. CALLERI, ESQ.

ANTELL, HARRIS & CALLERI
Attorneys for Petitioners
19 West Main Street, Suite 600
Rochester, New York 14614
(716) 325-6325

## APPENDIX

## Constitutional Provisions, Statutes and Regulations

### U.S. CONSTITUTION

1. Article XIV, §1 of the United States Constitution:

> Citizenship defined; privileges of citizens - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### U.S. STATUTES

2. 28 U.S.C. §1343 (3) which provides for original jurisdiction, without regard to the amount in controversy, of any civil action authorized



by law "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the United States."

3. 42 U.S.C. §1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

4. 42 U.S.C. §1983:

> Every person who, under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other property proceedings for redress.

5. 42 U.S.C. §2000d:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

6. 42 U.S.C. §2000e et. seq. in pertinent part:

(a) It shall be an unlawful employment practice for an employer



(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, separate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

7. 42 U.S.C. §2000d-2:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or

retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

8. 42 U.S.C. §2000e-5k:

In any action or proceeding under this subchapter, the Court, in its discretion, may allow the prevailing party, other than the commission or the United States, a reasonable attorney's fee as part of the costs, and the commission and the United States shall be liable for costs the same as a private person.

FEDERAL REGULATIONS

9. 28 C.F.R. §42.201 (a)-(b):

(a) The purpose of this subpart is to enforce the provisions of the 14th Amendment to the Constitution by eliminating discrimination on the



grounds of race, color, creed, sex, or national origin in the employment practices of State agencies or offices receiving financial assistance extended by this Department.

(b) The regulations in this subpart apply to the employment practices of planning agencies, law enforcement agencies, and other agencies or offices of States or unites of general local government administering, conducting, or participating in any program or activity receiving Federal financial assistance extended Under Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (the Act).

10. 28 C.F.R. §42.203:

No agency or office to which this subpart applies under §42.201 shall discriminate in its employment practices against employees or applicants for employment because of race, color, creed, sex or

national origin.

NEW YORK STATE CONSTITUTION

11. Article I, §11:

No person shall be denied the equal protection of the laws of this State or any subdivision thereof.

12. Article V, §6:

Appointments and promotions in the Civil Service of the State and of all the Civil Divisions thereof, including cities ***, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, so far as practicable, shall be competitive, ***.

CHARTER OF THE CITY OF ROCHESTER

13. §3-3 (A), (B), (G):

The charter of the City of Rochester provides that the Defendant City Manager has the following powers:

a. To see that all laws and ordinances are enforced.



b. To appoint and remove the heads of all departments the members of all Board and all subordinate officers and employees, except as otherwise provided in this local law.

c. To execute deed and to enter into contracts on behalf of the City, except as may be otherwise provided by law.

14. §8A-2:

The Charter of the City of Rochester provides for the authority of the Defendant, Chief of Police, as follows:

He shall appoint, with the approval of the City Manager, the personnel of all divisions under his jurisdiction.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

| | |
|---|---|
| JOHN E. HOWARD, GREGORY W. SCOTT, JOHNNY L. SMITH, TOMAS VAZQUEZ, JOHN WYCHE, HENRY ROUSE, ARCHIE ROUSE, AFRO-AMERICAN POLICE ASSOCIATION, Individually and on behalf of all other persons similarly situated, | |
| Plaintiffs, | ORDER AND JUDGMENT |
| -vs- | 74 Civ. 234 |
| ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK, THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT, MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION, EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION, | |
| Defendants. | |

The parties hereto having entered into a Stipulation for Settlement of the issues raised in this action; and the Court having ordered that notice of hearing on the advisability of the settlement be given to the members of the class; and the Court, after said notice and hearing, having approved the terms of the said Stipulation for Settlement,



IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. All written examinations which the Monroe County Civil Service Commission, its agents, employees, and successors, hereinafter use to determine eligibility for entry level positions in the Rochester Police Department shall be validated in accordance with the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.

2. Until such time as twenty-five percent (25%) of the Rochester Police Department's officers are minority persons, defendants, their agents, employees, and successors, shall make appointments to the entry level position of police officer in the following manner:

   a. After each examination process, the Monroe County Civil Service Committion, its agents, employees, and successors, shall establish an eligibility list of qualified candidates which includes two sublists:

      (1) The first sublist shall consist of all qualified minority canidates, ranked in order of their relative standing on said examination.

(2) The second sublist shall consist of all qualified nonminority candidates, ranked in order of their relative standing on said examination.

b. The City of Rochester shall make appointments by selecting two persons from the sublist of qualified minority candidates for every three persons selected from the sublist of qualified nonminority candidates.

c. In the event that all names of persons on the sublist of qualified minority candidates are exhausted, defendants, their agents, employees, and successors, shall make no further appointments until such time as an examination process is conducted and new eligibility lists and sublists are established, except that upon the exhaustion of the first sublist, the City of Rochester may make up to six appointments from the second sublist, provided that upon the establishment of a new first sublist the first four appointments to the Rochester Police Department thereafter shall be made from said new first sublist, and thereafter appointments shall be made in accordance with paragraph 2(b).

d. In the event the contingency specified in paragraph 2(c) occurs, all the persons remaining on the second sublist shall be given the option of submitting to the new examination process or of having their total score resulting from the prior examination process carried over and integrated into a new second sublist by being ranked in order of their relative standing with those persons having taken the new examination



process. In no event shall a person be carried over more than once, and in no event shall any sublists be effective for more than two years from the date of its original establishment.

3. Until such time as twenty-five percent (25%) of the Rochester Police Department's police officers are minority persons, defendants, their agents, employees, and successors, shall make appointments to any and all training programs including, but not limited to, the Police Cadet Program, in the manner described in paragraphs 2(a) - 2(c) herein; provided that the thirteen (13) individuals who were appointed to the Cadet Program on February 20, 1975, shall be appointed to the Rochester Police Department without regard to the requirements of paragraphs 2(a) - (c).

4. Defendants, their agents, employees, and successors shall make appointments based on the 1974 examination for police officer in the manner described in paragraphs 2(a) - 2(c) herein.

5. Within one hundred and twenty (120) days after entry of an order approving this

stipulation, the City of Rochester, its agents, employees, and successors, after consultation with plaintiffs' representatives, shall develop and implement a program for recruitment of minority persons for positions in the Rochester Police Department. The City shall pay the reasonable and necessary expenses of plaintiffs' consultant for travel, accommodation, and meals for one week.

6. Defendants, their agents, employees, and successors shall not reject a minority applicant for a position as police officer in the Rochester Police Department on the basis of a record of arrest or conviction, a background investigation, a psychological test and/or psychiatric interview unless said applicant is informed in writing of the specific reason(s) for the rejection and his right to review. A decision to reject said applicant on the basis of a background investigation, psychological test and/or psychiatric interview shall be subject to review if the applicant files a written request with the Monroe County Civil Service Commission within thirty (30) days after



mailing of the notice of rejection and his right to review. The review shall be conducted by a Review Panel comprised of a representative of the Civil Service Commission, a representative of the Rochester Police Department, and the Affirmative Action Officer of the City of Rochester or his representative.

7. Until such time as twenty-five percent (25%) of the Rochester Police Department's officers are minority persons, the Monroe County Civil Service Commission, its agents, employees, and successors shall file the following documents with the Clerk of the United States District Court for the Western District of New York on or before June 1 of each year:

(a) the written examinations which are used to determine eligibility for a position of police officer; and

(b) the validation studies of the written examinations described in paragraph 1; and

(c) an annual report describing:

(1) the number of nonminority and minority applicants for the position of police officer;

(2) the number of nonminority and minority persons appointed to the position of police officer;

(3) the number of nonminority and minority persons who are rejected at each step in the selection process for the position of police officer; and

(4) new selection procedures or devices.

8. The City of Rochester and the County of Monroe shall each pay plaintiffs, John E. Howard, Gregory W. Scott, Johnny L. Smith, Tomas Vazquez, John Wyche, and Henry Rouse, the sum of two hundred fifty dollars ($250.00) each upon receipt from each plaintiff of a release in full and complete satisfaction and settlement of any and all claims of said plaintiffs arising from defendants' past employment practices relating to employment of persons in the Rochester Police Department.

9. The City of Rochester and the County of Monroe shall each pay plaintiffs attorneys, the Monroe County Legal Assistance Corporation, the sum of three thousand dollars ($3,000.00) as reimbursement for the costs and attorneys' fees for this litigation.



10. (a) The term "minority" as used herein shall refer to a person who is black, Spanish-surnamed, or a member of some other nonwhite minority group. (b) The term "nonminority" as used herein shall refer to a person who is not a minority person as defined in paragraph 10(a).

11. The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to federal law designed to remedy the racially disproportionate impact of prior employment practices. The hiring mechanism set forth in paragraphs 2 and 3 shall remain in effect only until such time as twenty-five percent (25%) of the Rochester Police Department's officers are minority persons.

12. The United States District Court for the Western District of New York shall continue to have jurisdiction of this matter to entertain an application by any party hereto, made upon papers served upon the other parties hereto at least 10 days prior to the return date thereof, seeking relief in the form of interpretation, application,

adjustment or termination of any of the terms of this Stipulation on the grounds of inequity or impracticability.

13. Immediately after the Court has made and entered its order approving the terms of this Stipulation, the parties hereto shall join in an appropriate application to the New York State Division of Human Rights to dismiss with prejudice all proceedings pending before it regarding the same subject matter brought by any or all of the named plaintiffs herein.

14. This action is hereby dismissed with prejudice to the named plaintiffs and the class of persons consisting of all black, Spanish-surnamed, and other nonwhite persons who, prior to the date of this Order have applied for employment as a police officer in the Rochester Police Department and have been rejected for any reason at any step of the examination process.

Dated: May 12, 1975

S/ Harold P. Burke
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DI GIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY and SAMUEL T. GERMANO,

Plaintiffs

-vs-

Civ-
76-418

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Defendants

-vs-

RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Plaintiffs

-vs-

Civ-
76-433

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; AND EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Defendants

and

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Defendants-Intervenors.

---

APPEARANCES: ANTELL, HARRIS & CALLERI (ANGELO T. CALLERI, ESQ., of counsel), Rochester, New York, for Plaintiffs

LOUIS N. KASH, ESQ., Corporation Counsel of the City of Rochester (EMIL J. KARCICH, ESQ., of counsel), Rochester, New York, for defendants Freedman & Hastings.

JOSEPH PILATO, ESQ., Deputy County Attorney for defendants County of Monroe Civil Service Commission and Executive Director of the County of Monroe Civil Service Commission.

DAAN BRAVEMAN, ESQ., Greater Up-State Law Project, Rochester, New York,

and



MARIANNE ARTUSIO, ESQ., Monroe County Legal Assistance Corporation, Rochester, New York for Defendants-Intervenors.

Plaintiffs have brought these consolidated actions to seek compensatory and injunctive relief for what they claim to be discrimination in the recruiting, testing and hiring of applicants for the position of police officer in the City of Rochester, New York.

The Plaintiffs are white applicants for the position of police officer who challenge these practices as preferring black, Spanish-surnamed and other non-white persons for such positions. Defendants are public officials responsible for hiring applicants for positions as police officers in the Rochester Police Department. Defendant-Intervenors are the named plaintiffs in the lawsuit entitled John E. Howard, et al. v. Elisha Freedman, et al., Civil Docket No. 74-234 (W.D.N.Y.). The consent decree approved by Judge Harold P. Burke in the latter action approved practices which are the subject of the action.

A brief review of the history of the Howard litigation and earlier developments in this suit will place the present motion in perspective. In 1974 John Howard and other plaintiffs commenced an action under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. against the very defendants in this case. On the day trial was to begin, the parties agreed to terms for settlement. After a hearing Judge Burke entered an order incorporating the terms of the settlement agreement. The order provides for validation of written examinations, a minority recruitment program, a goal of 25% minority employment, and a temporary appointment mechanism to reach the hiring goal. Over a year later, a group of non-minority applicants, including 14 of the 16 plaintiffs in this suit, moved to intervene and reopen the Howard case on grounds of reverse discrimination against non-minority individuals. I found that motion to be untimely since the plaintiffs had notice of the terms of the consent decree but failed to act at that time. To reopen



that case would have caused undue delay and hardship to the original parties. Howard v. Freedman, Civ-74-234 (W.D.N.Y. June 22, 1976). Subsequently the applicants for intervention stipulated to a dismissal of their appeal to the Second Circuit on October 22, 1976.

Plaintiffs filed the complaint in this action with the court on September 17, 1976. A motion for a preliminary injunction against the appointment of successful police applicants to the Police Academy was denied on October 20, 1976. The action is currently before the court on defendants' motion to dismiss under Fed.R.Civ.P. 12(b) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

FEDERAL LAW CLAIMS

Defendants challenge the court's jurisdiction in this action since it constitutes a collateral attack on the final court order in John E. Howard, et al. v. Elisha Freedman, et al, Civil Docket No. 74-234 (W.D.N.Y. 1975). They

cite Oburn v. Shapp, 393 F.Supp. 561 576 (E.D.Pa. 1975), aff'd on other grounds, 521 F.2d 142 (3d Cir. 1975), to establish that in a similar case, a white police applicant's challenge to affirmative hiring relief granted by court order to minority applicants was impermissible.[1/] Furthermore, in Construction Industry Combined Committee v. International Unions of Operating Engineers, 67 F.R.D. 664 (E.D. Mo. 1975), the court would not permit litigation of the merits of a Title VII consent decree in a separate action. There the court noted that the proper avenue for relief would have been a timely intervention in the original case.

I must follow the line of legal precedent cited in Oburn and Construction Industry. This suit constitutes an impermissible collateral attack on Judge Burke's ruling in Howard. The plaintiffs in this case should properly have sought timely intervention in the Howard case, but failed to do so as ruled in my June 22, 1976



decision. To permit further challenge of the Howard consent decree would clearly violate the policy under Title VII to promote settlement, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). This would also result in continued uncertainty for all parties involved and render the concept of final judgments meaningless. Cf. Class v. Norton, 505 F.2d 123, 125 (2d Cir. 1974).

Even if this court could assert jurisdiction over the subject matter, the complaint still fails to state a claim upon which relief may be granted.

Time and again in the employment discrimination context, the courts have held that the Constitution does not bar remedial orders granting a limited preference to members of groups that have previously been discriminated against. See Rios. v. Enterprise Association Steamfitters Local 638, 501 F.2d 622, 628-630 (2d Cir. 1974); see also E.E.O.C. v. AT&T Co., 419 F.Supp. 1022, 1044-45 (E.D.Pa. 1976). The cases cited by plaintiffs are distinguishable from this case since they

do not involve entry levels goals. See, e.g., Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). Therefore, no legal challenge may be mounted by this action against the limited use of preferences approved in the Howard decree.

Defendants also argue that dismissal is warranted because the plaintiffs have failed to comply with the jurisdictional prerequisite of filing a complaint with the Equal Employment Opportunity Commission and exhausting their administrative remedies. Since I believe that the suit may be dismissed as an improper collateral attack, I do not find it necessary to rule on this ground.

STATE LAW CLAIMS

In their complaints plaintiffs also assert that defendants' conduct violates the New York State Constitution. Defendants argue that this court should not take pendent jurisdiction over the state claim or, in the alternative, that



these allegations should be dismissed for failure to state a claim upon which relief may be granted.

Since the court cannot assert subject matter jurisdiction over the plaintiffs' federal law action, it must also forego jurisdiction of the pendent state law claims. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1965).

Furthermore, the practices which the plaintiffs challenge were properly established by Judge Burke in the Howard consent decree. Since that remedy was imposed pursuant to Title VII, it suspends the application of conflicting state law. U.S. Const. art.VI, cl.2; see also Louisiana v. United States, 380 U.S. 145 (1965); Carter v. Gallagher, 452 F.2d 315, 328 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972). Therefore, the plaintiffs' complaint must also be dismissed as to claims grounded in state law since they fail to state a claim upon which relief may be granted.

The Clerk is directed to enter Judgment dismissing plaintiffs' complaint.

ATTORNEY FEES

Defendants-Intervenors have moved to recover reasonable attorney fees and costs incurred in this suit. Under 42 U.S.C. §2000e-5(K), the court has discretion to award a reasonable attorney fee to the prevailing party in a Title VII action. The Second Circuit has ruled that a prevailing defendant should be permitted such fees only where the action brought is found to be "unreasonable, meritless or vexatious." Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976).

In this action the plaintiffs have brought claims which are virtually identical to those asserted in their prior unsuccessful motion to intervene in the Howard litigation. Furthermore, this attack on the Howard order has been brought despite the body of case law in this and other circuits which rejects such claims. Based upon these considerations, this suit may be considered unreasonable and vexatious. Defendants-Intervenors are therefore directed to submit an affidavit to the court detailing their attorney fees in this



action. Plaintiffs may also file an affidavit in opposition to the motion for attorney fees. These affidavits shall be filed not later than May 23, 1977. A hearing on defendants' application shall be held on June 17, 1977 at 9:00 a.m.

So ordered.

S/ John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: May 3, 1977

---

1/

Since the ruling Judge Green has, in a separate decision, dismissed the complaint in Oburn. He found the claim of reverse discrimination to be an improper collateral attack over which he could not assert subject matter jurisdiction. See Oburn v. Shapp, 70 F.R.D. 549 (E.D.Pa. 1976) aff'd 546 F.2d 418 (3rd Cir. 1976), cert. denied, 45 U.S.L.W. 3688 (April 19, 1977).

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of October one thousand nine hundred and seventy-seven.

Present:

HON. STERRY R. WATERMAN

HON. WILLIAM H. MULLIGAN

HON. WILLIAM H. TIMBERS

Circuit Judges, 77-7253

Ronald Prate, Leonard LaRosa, Patricia Plumeri, Patricia A. Doyle, Theresa Young, Terrence P. Anderson, Michael A. DiGiovanni, Gary Gennarino, Michael C. Keller, Charles J. Zona, Joseph P. Tantalo, Michael Perry and Samuel T. Germano,

Plaintiffs-Appellants,

v.

Elisha Freedman, City Manager of the City of Rochester, New York, Thomas Hastings, Chief of Police of the City of Rochester Police Department, Members of the County of Monroe Civil Service Commission, and Executive Director of the County of Monroe Civil Service Commission,

Defendants-Intervenors-Appellees.



Ronald S. Zavaglia, Carol Tschiderer, and Thomas A. Tschiderer,

Plaintiffs-Appellants,

v.

Elisha Freedman, City Manager of the City of Rochester, New York, Thomas Hastings, Chief of Police of the City of Rochester Police Department, Members of the County of Monroe Civil Service Commission, and Executive Director of the County of Monroe Civil Service Commission,

Defendant-Appellees,

John Howard, Johnny L. Smith, and John Wyche,

Defendants-Intervenors-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

By ARTHUR HELLER, Deputy Clerk